



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Office of Federal Operations**  
**P.O. Box 77960**  
**Washington, DC 20013**

[REDACTED]  
Rudolf D.,<sup>1</sup>  
Complainant,

v.

Matthew P. Donovan,  
Acting Secretary,  
Department of the Air Force,  
Agency.

Appeal No. 0120181685  
Hearing No. 420-2016-00013X  
Agency No. 9Z0J15002F17

**DECISION**

On April 24, 2018, Complainant filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission), pursuant to 29 C.F.R. § 1614.403(a), from the Agency's October 22, 2017, final order concerning his equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq., Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act), as amended, 29 U.S.C. § 791 et seq., and the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq. For the following reasons, the Commission AFFIRMS the Agency's final order.<sup>2</sup>

**ISSUE PRESENTED**

Whether an Equal Employment Opportunity Commission Administrative Judge correctly granted summary judgment regarding Complainant's claim that he was discriminated against based on national origin (German), disability (bilateral knees) and age (64) when the Agency did not select him for the Foreign Affairs Specialist position at Maxwell Air Force Base, Alabama.

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<sup>1</sup> This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

<sup>2</sup> According to the Agency, Complainant did not receive a copy of its final order until April 2, 2018. The Agency does not contest the timeliness of Complainant's appeal.

### BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Historian at the Agency's Ramstein Air Base facility in Germany. On March 23, 2014, Complainant filed an EEO complaint alleging that the Agency discriminated against him when he was not selected for a Foreign Affairs Specialist position.

The Agency utilized a resume-based hiring process for employees or applicants for positions with the Agency. Applicants submitted resumes with their qualifications and experience relevant to the position advertised. At the time of the Foreign Affairs Specialist advertisement at issue in this matter, Complainant was employed as a Professor and a Historian. Complainant submitted a curriculum vitae for the Agency's open position for a Foreign Affairs Specialist. The vitae included six lines on his civilian university experience as a "Director of International Affairs." Complainant's resume also stated that he had a 40% VA disability rating and at the time was 64 years old.

To be qualified for the position, the Agency indicated that the applicant had to have one year of specialized experience including "expert knowledge of a wide range of Department of Defense and Agency policies, procedures and regulations applicable to national security strategy, and other specialized knowledge. Complainant and approximately sixteen (16) other individuals applied for the position. Complainant was not selected for the position.

C1, the selectee, had previously served as Dean of Students and an International Military Student Officer. At the time of the selection, C1 was serving in an International Military Student Officer (IMSO) position and in a Foreign Affairs Socialist position at the GS-12 level. C1's resume contained details of his duties, as well as his relevant accomplishments and related skills for the position. C1 was 51 years old.

Based on the Agency's objectives and eligibility requirements, Complainant did not initially make the referral list for the certification and was so notified. The top five candidates were considered for the position. Complainant inquired into his non-referral, and, after a review, the Agency re-examined his application and determined that he should have been referred for consideration for the position. A new Certificate of Eligibles was issued and Complainant was included and considered for the position. C1 was again selected for the position. Complainant was not ranked among the top five candidates. The Agency notified Complainant of his non-selection.

The Agency stated that Complainant's protected categories "played no part in the decision not to select him for the position." The Agency determined that Complainant's resume was qualifying, but that C1 possessed several qualities critical to the position which Complainant lacked. Specifically, the successful candidate needed experience serving as an IMSO, managing government sponsored international dependent programs and issues, executing a Field Studies Program, working in a security cooperation, and earning an International Affairs Specialist certification. C1 possessed all these critical qualities.

The Agency's review of Complainant's qualifications found a lack of the required experience for the position. He never served as an IMSO, he had no experience executing either an FSP program or an international dependent program. He had no experience in any other area of the security cooperation architecture, and he had never completed any of the certifications or courses that are essential for being successful in the position, according to the Agency. Complainant's experience was as a Professor and a Historian.

Complainant contends that his initial exclusion and subsequent inclusion for consideration "reveal a concerted effort to quash his candidacy." He felt that his subsequent placement on the eligible list was "an attempt at a quick fix." He stated that he had experience with foreign students from the private sector and dealt with foreign officers as a sponsor. The Agency responded, in part, by advising Complainant that his inclusion for consideration, while not initially pursued, was "a stage of a fair and rational process."

At the conclusion of the investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an Equal Employment Opportunity Commission Administrative Judge (AJ). Complainant timely requested a hearing. When Complainant did not object, the AJ assigned to the case granted the Agency's October 3, 2015, motion for a decision without a hearing and issued a decision without a hearing on August 31, 2017. The AJ found no genuine dispute with respect to any material facts and no genuine issue as to credibility which would warrant a hearing on the merits of Complainant's allegations of discrimination. The Agency subsequently issued a final order adopting the AJ's finding that Complainant failed to prove that the Agency subjected him to discrimination as alleged.

### CONTENTIONS ON APPEAL

Complainant filed a brief averring, among other things, that he has experience in international affairs and that he is qualified for the Foreign Affairs Specialist position. He also reiterated his assertion that he never should have been removed from consideration initially.

The Agency, among other things, asked that we affirm its final order.

### ANALYSIS AND FINDINGS

In rendering this appellate decision we must scrutinize the AJ's legal *and* factual conclusions, and the Agency's final order adopting them, de novo. See 29 C.F.R. § 1614.405(a) (stating that a "decision on an appeal from an Agency's final action shall be based on a de novo review . . ."); see also Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9, § VI.B. (Aug. 5, 2015) (providing that an administrative judge's determination to issue a decision without a hearing, and the decision itself, will both be reviewed de novo). This essentially means that we should look at this case with fresh eyes. In other words, we are free to accept (if accurate) or reject (if erroneous) the AJ's, and Agency's, factual conclusions and legal analysis – including on the ultimate fact of whether intentional discrimination occurred, and on the legal issue of whether any federal employment discrimination

statute was violated. See id. at Chapter 9, § VI.A. (explaining that the de novo standard of review “requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker,” and that EEOC “review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and . . . issue its decision based on the Commission’s own assessment of the record and its interpretation of the law”).

We must determine whether the AJ appropriately issued the decision without a hearing. The Commission’s regulations allow an AJ to issue a decision without a hearing upon finding that there is no genuine issue of material fact. 29 C.F.R. § 1614.109(g). EEOC’s decision without a hearing regulation follows the summary judgment procedure from federal court. Fed. R. Civ. P. 56. The U.S. Supreme Court held summary judgment is appropriate where a judge determines no genuine issue of material fact exists under the legal and evidentiary standards. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). In ruling on a summary judgment motion, the judge is to determine whether there are genuine issues for trial, as opposed to weighing the evidence. Id. at 249. At the summary judgment stage, the judge must believe the non-moving party’s evidence and must draw justifiable inferences in the non-moving party’s favor. Id. at 255. A “genuine issue of fact” is one that a reasonable judge could find in favor for the non-moving party. Celotex v. Catrett, 477 U.S. 317, 322-23 (1986); Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988). A “material” fact has the potential to affect the outcome of a case.

An AJ may issue a decision without a hearing only after determining that the record has been adequately developed. See Petty v. Dep’t of Def., EEOC Appeal No. 01A24206 (July 11, 2003). We carefully reviewed the record and find that it is adequately developed. To successfully oppose a decision without a hearing, Complainant must identify material facts of record that are in dispute or present further material evidence establishing facts in dispute. Here, Complainant did not meet his burden. Ultimately, the AJ correctly determined that there are no genuine issues of material fact or credibility that merited a hearing. Therefore, the AJ’s issuance of a decision without a hearing was appropriate.

### *Disparate Treatment*

To prevail on claim of disparate treatment discrimination, Complainant must satisfy a three-part evidentiary scheme first enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). First, Complainant must establish a prima facie case by demonstrating that he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. McDonnell Douglas, 411 U.S. at 802; Furnco Constr. Co. v. Waters, 438 U.S. 567, 576 (1978). Second, the burden is on the Agency to articulate a legitimate, nondiscriminatory reason for its actions. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). Third, should the Agency carry its burden, Complainant must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Agency were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804; St. Mary’s Honor Center v. Hicks, 509 U.S. 502 (1993). Where the Agency has articulated a legitimate, nondiscriminatory reason for the personnel action at issue, the factual inquiry can proceed directly

to the third step of the McDonnell Douglas analysis. See U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-14 (1983).

Assuming, arguendo, that Complainant established a prima facie case of discrimination on the alleged bases, we find that the Agency articulated legitimate, nondiscriminatory reasons for not selecting Complainant for the Foreign Affairs Specialist position. The Agency determined that Complainant's resume was qualifying, but that C1 possessed qualities that were critical to the position which Complainant lacked. The successful candidate needed experience serving as an IMSO managing government sponsored international dependent programs and issues; and experience executing a Field Studies Program, including working in a security cooperation, and having an International Affairs Specialist certification. Complainant's work history did not reflect any of the critical experiences or credentials. C1, on the other hand, possessed all the critical requirements.

### CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM, the Agency's final order.

### STATEMENT OF RIGHTS - ON APPEAL RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision. A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director  
Office of Federal Operations

August 14, 2019

Date